93-653

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GENE EVERETT, 5 STAR DIESEL REPAIR, INC. AND MARYLAND CASUALTY COMPANY

Petitioners,

v.

AMERICAN CENTRAL GAS COMPANIES, INC. AND TRISTAR ENERGY, INC.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this diversity case, the court of appeals has not followed the rule of Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938) in that it failed to state and apply applicable state law. At issue is the correct application of Texas law as it relates to the defensive plea of an appropriate statute of limitations. Petitioner comes to this court seeking a writ of certiorari from the Fifth Circuit Court of Appeals as to the following questions:

1. Does Texas law permit the use of the statute of limitations to bar a claim, where it is undisputed that all of the purposes of the statute of limitations have been met, in that the defendant:

(a) has actual notice of the claim;

(b) has received a copy of the pleadings (and other documents);

and

(c) has neither asserted nor shown that it had been harmed?

2. Under the factual circumstances of this case, did the court of appeals err when it overturned a jury finding to the effect that the plaintiff had exercised due diligence in procuring service of citation on the defendant?

3. Does Texas law permit the use of the statute of limitations to bar a claim, where:

(a) it is undisputed that suit was filed within the applicable time period;

(b) service was not perfected until after the expiration of the applicable time period; and

(c) it is also undisputed that all of the purposes of the statute of limitations have been met in

that the defendant had actual notice of the claim, had received a copy of the pleadings timely and had neither asserted nor showed that it had been harmed by the lack of service within the applicable time period?

4. Did the Fifth Circuit Court of Appeals correctly state and apply the applicable state law to the facts and circumstances of this case?

5. Did the Fifth Circuit Court of Appeals err when it held that, under the facts and circumstances of this case, no sufficient evidence existed to support the jury's finding to the effect that plaintiff had exercised due diligence in procuring service of citation on the defendant?

LIST OF ALL PARTIES

All parties to the appeal below are named in the caption. Moreover, Tristar Energy, Inc. and American Central Gas Companies, Inc., have merged and now do business as American Central Gas Companies, Inc.

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Petitioners,

v.

AMERICAN CENTRAL GAS COMPANIES, INC. AND TRISTAR ENERGY, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners, Gene Everett, 5 Star Diesel Repair, Inc., and Maryland Casualty Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 9, 1993.

OPINIONS

The opinion of the court of appeals for the Fifth Circuit is not reported but is reprinted in Appendix A, page 1a, infra.

The order denying the petition for rehearing is unreported and is set forth in Appendix B, page 16a, infra.

The judgment of the United States District Court for the Western District of Texas, Midland-Odessa, is unpublished and is set forth in Appendix C, page 17a, infra.

JURISDICTION

Original jurisdiction of this case was based on diversity of citizenship. The judgment of the court of appeals for the fifth circuit was entered on June 9, 1993. A petition for rehearing was denied on July 2, 1993. (Appendix A and B). The jurisdiction of this court is invoked

under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

During the night of September 19-20, 1989, an explosion and fire in Odessa, Texas, destroyed Gene Everett's place of business known as 5 Star Diesel Repair. After proper demand, Everett sued American Central Gas Companies, Inc. and Tristar Energy, Inc. (hereinafter "the Gas Companies") for property damages and other economic loss he sustained. Suit was filed in the Texas state district court for Ector County on November 19, 1990. At that time, Everett sent copies of his petition to counsel for the Gas Companies, with whom he had conducted prior communications regarding this claim. (R. I:105-121; IV:342-344, 351-353; Pl. Ex. 10). Service was not effected on the Gas Companies, however, until March 30, 1992.

The applicable statute of limitations

provided that the claim was barred unless appropriate action was taken within two years from the date of occurrence. Thus, limitations expired on September 20, 1991. Suit was filed in November, 1990, some nine to ten months before the expiration of the statute of limitations, but service was not effected until approximately six months after expiration of the statute on March 30, 1992. The Gas Companies filed their Original Answer on April 16, 1992, and removed the case to the Federal District Court for the Western District of Texas, Midland-Odessa Division. Removal was based upon diversity jurisdiction.

Discovery revealed (through admissions, stipulations and undisputed evidence) that the Gas Companies owned and operated a gas line, ten inches in diameter, which ran along Everett's north boundary line. Approximately one week

before the explosion, the Gas Companies had repaired a leak directly in front of Everett's business (R. III:39). Within five days after the explosion, the Gas Companies were aware of the explosion and the damage to Everett's building. (R. IV:147 and 175, 176, III:52, 53).

After the explosion, Everett filmed by video tape a process by which he would punch holes in the ground in various locations on his premises over the Gas Companies' gas line and then could ignite the fumes escaping from the holes (R. III:30-36). Everett, through his attorney, made demand upon the Gas Companies to compensate him for his losses by letter dated April 10, 1990 (R. I:108; Pl. Ex. 10). In April and May of 1990, the attorneys for the Gas Companies responded and acknowledged receipt of these demands. (R. I:110-111; Pl. Ex.

10). Thus, the Gas Companies were aware of Everett's demands some sixteen months before the expiration of the applicable statute of limitations.

Additionally, on August 17, 1990, (thirteen months before the expiration of the applicable statute of limitations) Everett transmitted to the Gas Companies the following:

a. an inventory and appraisement prepared by Everett listing all of the contents of the building and valuing each of them;

b. reports from the Texas Railroad Commission and other investigators, including the fire marshal, concerning the fire;

c. laboratory reports showing the chemical analysis of the gas seeping in and around Everett's

place of business;

d. the video tape described above, which showed the leaks that could be ignited. (R. I:112-121; Pl. Ex. 10).

Thereafter, in November of 1990, Everett forwarded to the Gas Companies true and correct copies of the Plaintiff's Original Petition which was filed on November 19, 1990 (R. I:110-111; IV:342-344, 351-353; Pl. Ex. 10). The Gas Companies admitted they received copies of Everett's petition some nine to ten months before the expiration of the applicable statute of limitations.

Under these circumstances, Everett's attorney did not believe that formal service of citation was going to be necessary. (R. IV:342-344, 351-353). Everett's attorney did not discover that citations were not issued until the latter

part of March, 1992. He then proceeded to promptly secure service on March 24, 1992. For these reasons, service was actually effected some six months after the expiration of the statute of limitations.

The Gas Companies moved for summary judgment contending that Everett failed to use due diligence in attempting to procure service of process. Everett responded by asserting that, under Texas law, due diligence was not an issue in the case, and that, even if it was, due diligence had been shown. After considering the motions, applicable law, evidence, briefs and arguments of the parties, the district court denied the motion.

The case proceeded to trial before a jury in Midland, Texas, which began on September 30, 1992 and ended on October 2, 1992. The jury returned a verdict favorable to Everett. It specifically

found, in response to question 10, that Everett, through his attorney, had exercised due diligence in obtaining both the issuance and service of citation upon the Gas Companies. (R. I: 228).

The Gas Companies moved for judgment as a matter of law at the close of Everett's case in chief, at the close of the Gas Companies' case, and again after the jury returned its verdict for Everett. The district court, after hearing the arguments of counsel, also denied these motions. The Gas Companies then moved for a new trial which was denied. The court entered its Judgment for Everett on October 7, 1992. The Gas Companies properly perfected their appeal to the Court of Appeals for the Fifth Circuit. The Court of Appeals overturned the judgment of the district court and ordered a dismissal of Everett's claim. It held

that Everett's claim was barred by the applicable statute of limitations. In essence, the court held that the fact that no harm had been shown to have occurred was of no moment. Moreover, it held that the fact that all of the purposes of the statute of limitations had been met, was immaterial. Finally, the court overlooked the facts and circumstances surrounding the notice to the defendants, and held that there was no evidence to support the jury's findings on due diligence.

It is from this decision that Everett perfects his appeal.

REASONS FOR GRANTING THE WRIT

Quite simply, the court of appeals misapprehended and then misapplied applicable Texas law. In so doing, the court emphasized form over substance and ignored the purpose for which the statute of limitations was created.

It is, of course, undisputed that Texas law controls the disposition of this appeal. It is further undisputed that the applicable statute of limitations is contained in Texas Civil Practice & Remedies Code Annotated, §16.003(a) (Vernon 1986). This statute required Everett to bring suit within two years from and after September 19-20, 1989. Thus, the limitation period as to Everett's cause of action expired on September 20, 1991.

In this case, the undisputed evidence shows that Everett did in fact institute a lawsuit in November of 1990, some nine months prior to the expiration of the statute of limitations. Moreover, by the Gas Companies own admission, they received at or near that time a true and correct copy of Everett's petition (Pl. Ex. 10). Finally, and even more compelling, it is

undisputed that, from and after November of 1990 (nine months before the expiration of the statute of limitations), the Gas Companies had actual notice, at a minimum, of the following:

1) The occurrence;

2) The fact of and nature of Everett's claim;

3) The amount of damages sought by Everett, and supporting documents;

4) The method by which Everett calculated most, if not all, of his losses, and supporting documents;

5) The laboratory analysis upon which Everett would in part rely;

6) Everett's video tape showing ignitable gas at his business location;

7) A true and correct copy of Everett's Original Petition.

In cases such as this case, where suit is filed prior to the expiration of the statute of limitations but service is not perfected until after the expiration of the statute of limitations, Texas law is clear.

The Texas courts divide these cases into two categories:

1) cases in which the defendant had actual knowledge of the suit prior to service of citation; and

2) cases in which the defendant had no knowledge of the suit prior to service of citation.

It is undisputed that this case falls into the first category. In such cases, the Texas courts do not rigidly apply the applicable statute of limitations but,

instead, engage in a harm analysis. There is a determination as to whether the purposes of the statute of limitations have been met. If the defendant cannot demonstrate any harm or prejudice, and the court determines that the purpose of the statute of limitations has been met, the plea of limitations is denied. The question of diligence in securing the issuance of service of citation is not considered.

ALL PURPOSES OF THE STATUTE OF LIMITATIONS HAVE BEEN MET

The facts of this case demonstrate that all of the purposes of the statute of limitations were met. These purposes are clear. As this Court stated in Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965):

Statutes of limitation are primarily

> designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of the claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the rights to prosecute them. (Emphasis added).
>
> This policy of repose, designed to protect defendants, is frequently outweighed, however, when the interest of justice require vindication of the plaintiff's rights." Burnett, supra at page 1054 and 1055.

Statutes of limitations are designed to promote justice. As the Court further stated in United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2 259 (1979):

> "...it is unjust to fail to put the adversary on notice to defend within a specified period of time...
>
> These enactments are statutes of repose, and although affording plaintiffs what the legislature deems

> a reasonable time to present their claims, they protect Defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." Kubrick at 117.

Texas law is in accord. As the Texas Supreme Court held in Moreno v. Sterling Drugs, Inc., 787 S.W. 2d 348 (Tex. 1990):

> "We begin our analysis by observing that the primary purpose of ... all limitation statutes is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available."

In Murray v. San Jacinto Agency, Inc., 800 S.W. 2d 826 (Tex. 1990), the Texas Supreme Court further recited the rule stated in United States v. Kubrick supra, by stating:

> "Limitation statutes afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be

> seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." Murray at 828.

As can be seen by these cases, it is clear that the primary purpose of a statute of limitations is to put the Defendant on notice of the Plaintiff's claim. If the Defendant has notice of the claim, justice has been served since the Defendant has had an opportunity to prepare his defense.

As heretofore shown, the evidence is undisputed that the Gas Companies had actual notice of Everett's claim long before the statute of limitations expired.

There is no evidence which indicates that by virtue of the passage of time, any witnesses disappeared, that any documents were lost or destroyed, that the Gas Companies were surprised in any manner, or that the ability of the Gas Companies to

obtain evidence of any kind was in any way hampered. Indeed, the Gas Companies ably presented their case through the testimony of numerous witnesses, including the fire investigator at the scene (R. IV:193-194), an employee of the Texas Railway Commission who conducted an investigation and compiled a report shortly after the accident (R. IV:202-207), and three expert witnesses, who are as follows:

a. Mr. Stone (R. IV:212-226), who testified that the Gas Companies' procedures were correct and made no complaint about the passage of time affecting his ability to form an opinion;

b. Mr. Hilderbrand (R. IV:227-271), who testified as to the cause of the fire and, although he complained about the fire

marshal's investigation and the lack of forensic evidence, was definite in his opinion that he could rule out the Gas Companies as the culprit (R. IV:256); and

c. Mr. Smyth (R. IV:271-315), who also complained about the lack of an immediate proper investigation, but who concluded that the Gas Companies' gas could not have caused the explosion (R. IV:300).

The Gas Companies have not and, indeed, cannot contend that they were in any way hampered by the passage of time in the presentation of their case. As shown, the record clearly reflects that the Gas Companies ably presented their case.

Under these facts, all of the purposes of the statute of limitations, as enumerated by the courts, have been met.

Clearly, Texas justice will be thwarted by a rigid application of the statute of limitations in this case.

DUE DILIGENCE ISSUE

In its opinion, the court of appeals emphasized the long passage of time between the filing of suit (November, 1990) and the securing of service of citation (March, 1992). The court assumed that, despite the facts, Texas law required Everett to show diligence in securing service of process. It held that no such diligence had been shown regardless of the facts and despite the contrary finding of the jury. The court's analysis is incorrect in two respects:

1. Due diligence to secure citation is not the issue; and
2. In any event, under the facts and circumstances of this case, due diligence was shown.

A careful analysis of Texas law shows that in every case in which it is shown that the Defendant had actual knowledge of the suit, and where the purposes of the statute of limitations are met, Texas Courts do not look to the diligence of the plaintiff in securing service.

The case of Parker v. Enserch Corp., 776 S.W.2d 638 (Tex. App. - Dallas, 1989), is instructive. In that case, one day prior to the expiration of the statute of limitations, the plaintiff sued Lone Star Gas Company. A year and a half later, the plaintiff apparently realized his error and moved to substitute the correct defendant, Enserch Corp., for Lone Star Gas Company. The facts reveal that Enserch Corp. was closely related to, if not identical, to Lone Star Gas Company. The same attorneys and personnel were used

by Enserch Corp. and Lone Star Gas Company. Thus, it was shown that the correct defendant, Enserch Corp., had actual knowledge of the suit.

Enserch Corp. moved for summary judgment based upon the statute of limitations and the trial court granted the motion. The court of appeals reversed the trial court judgment and held, in relevant part, as follows:

> "...limitations will not bar the suit against the proper Defendant, so long as the latter is cognizant of the facts, is not misled, and is not placed at a disadvantage in obtaining the relevant evidence necessary for its defense." Citing, inter alia, Palmer v. Enserch Corp., 728 S.W. 2d 431, 433 (Tex. App. - Austin 1987, writ ref. n.r.e). Parker at 645.

The Texas court of appeals also held:

> "Generally, a plaintiff must exercise diligence in the prosecution of its cause of action. The party must plead and prove that he exercised due care to prevent the running of the statute in order to overcome the properly asserted defense of limitation. However, as analyzed at

> length by the Palmer court, under Hilland and its progeny (Continental Southern Lines, Inc. v. Hilland, 528 S.W. 2d 828 (Tex. 1975) when the cause of action is timely asserted but against the wrong party, diligence is not the issue; the issue is "whether the protection of the limitation statute is equitable under the facts once the correct party is named." Parker at 646. (Emphasis added)

Enserch Corp. appealed and the Texas Supreme Court affirmed the ruling on this issue. Enserch Corp. v. Parker, 794 S.W. 2d (Tex. 1990). The Texas Supreme Court affirmed the court of appeals' decision. The court quoted with approval the holding in Palmer v. Enserch Corp., 728 S.W. 2d 431 (Tex. App. - Austin 1987, writ ref. n.r.e.). It held:

> "... that diligence of the plaintiff in preventing the running of limitations is not the issue; rather the issue is whether the legitimate purpose of the limitations statute would be served by its application under circumstances where no party is misled or placed at a disadvantage..." Enserch Corp. at 5. (Emphasis added)

The court noted that all defendants "...were fully cognizant of the facts of the accident and could not have been misled as to the basis of the suit." Enserch Corp. at 6.

Federal courts have applied similar rules in fact situations showing that the purposes of the statute of limitations have been met. In Platoro Ltd, Inc. v. Unidentified Remains of a Vessel, 614 F. 2d 1051 (5th Cir. 1980), the court reaffirmed the right of federal courts to toll the statute of limitations under circumstances not inconsistent with the purpose of the statute. Citing Burnett v. New York Central Railroad, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), the court held:

> "The court noted that the period (of the statute of limitations) is not totally inflexible, but under appropriate circumstances may be extended. The basic question is

> whether tolling the statute in a particular case is in keeping with the legislative intent underlining the act itself. In noting that the statute of limitations are designed primarily to assert fairness to Defendants by preventing the revival of claims that have been allowed to slumber until evidence has been lost and witnesses have disappeared, the court pointed out that this "policy of repose" is frequently outweighed where "the interest of justice requires the vindication of the plaintiff's rights." Platoro Ltd, Inc. at 1054.

Likewise, in Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958), the court again refused to enforce a rigid application of the statute of limitations. In Jackson, the plaintiff had given notice to the correct party but had not properly named him. Summons in the correct name was not obtained until after the statute of limitations had run. It was clear that a technical defect existed but the correct defendant had notice of the nature and extent of the claim and could show no

prejudice or harm to him.

As has been shown, the undisputed facts of this case are that Everett presented his claim in a timely manner and that the Gas Companies were well aware of the nature of Everett's claim and the evidence to support it at least ten months before the expiration of the applicable statute of limitations. No showing was made, nor can such be made, of any factor which would inhibit the search for truth. Under such circumstances, the court need not even reach the question of diligence. The purpose of the statute of limitations was met.

The recent per curiam opinion of the Texas Supreme court in Rooke v. Jenson, 838 S.W.2d 229 (Tex. 1992), shows that Texas continues to follow this rule. The case concerns an automobile collision which occurred on January 17, 1986. The

applicable statute of limitations expired on January 17, 1988. The plaintiff attempted service in January of 1988, but learned that the defendant had died. The defendant's widow, as sole beneficiary under the defendant's Will, was then substituted as the defendant in her capacity as executrix of the defendant's estate, but was not served until after the expiration of the statute of limitations. It was undisputed that the defendant's widow was aware of the suit. The trial court granted the defendant's motion for summary judgment based solely on the defense of limitations. The court of appeals affirmed. The Texas Supreme Court, however, reversed. It is illustrative to note that the court did not indicate that <u>any</u> party was served prior to the expiration of the statute of limitations. The court quoted with

approval Price v. Estate of Anderson, 522 S.W.2d 690, 691 (Tex. 1975), in which the court refused the bar of limitations since "the purpose and nature of the claims asserted were clear from the outset," and held:

> "A contrary holding would in no way serve this purpose of the statute of limitations. As appropriately determined in Castro v. Harris County, 663 S.W.2d 502, 505 (Tex. App. - Houston [1st Dist.] 1983, writ dismissed), "the statute of limitations herein involved was not created to provide a log behind which opportunistic defendants could smugly lay for two years and then emerge solemnly proclaiming their statutory rights..." Rooke at 230.

Thus, it is clear that, as in the instant case, where the defendant had actual knowledge of the suit prior to the expiration of the statute of limitations, but service was not effected until after expiration, Texas courts do not rigidly

apply the statute of limitations. Instead, Texas courts look to see if the purposes of the statute of limitations have been met. Where, as here, all of the purposes have been met, Texas courts do not even raise the issue of due diligence in securing service of citation. Undoubtedly, the holding of the Fifth Circuit Court of Appeals on this issue, is contrary to the decisions of the state appellate courts on the same issue.

Regardless of all of the above arguments, under the facts and circumstances of this case, due diligence by the plaintiff in this case was shown. Therefore, the court of appeals also erred in overturning the jury's finding that Everett did exercise due diligence in securing service of process. As indicated above, the issue of due diligence in securing service of process should not

have even been reached. The cautious trial judge, however, submitted an issue to the jury. Question No. 10 of the court's charge to the jury reads as follows:

> QUESTION 10.
>
> DO YOU FIND THAT PLAINTIFFS, THROUGH THEIR ATTORNEY, EXERCISED DUE DILIGENCE IN OBTAINING BOTH THE ISSUANCE AND SERVICE OF CITATION UPON DEFENDANTS?
>
> ANSWER "YES" OR "NO."
>
> ANSWER: YES (R. I:228)

The court of appeals overturned this jury finding and held that, as a matter of law, the plaintiff failed to exercise due diligence in securing service of citation. The court focused, however, on the lack of activity from and after the date suit was filed. The court ignored the main reason that Everett, through his attorney, did not secure service more promptly - because from and after November of 1990, the Gas

Companies had more notice than service of citation would have given them. The district court and jury were apparently aware of the real facts, for they each concluded that due diligence had been shown.

In its opinion, the Court describes Everett's argument as "no harm, no foul". It concludes that this position requires the courts to engage in a case by case analysis of actual notice and harm, which is "certainly not the law in Texas."

To the contrary, a "case by case analysis" is precisely the position taken by the Texas (and Federal) courts, as is shown by the following:

International Derrick & Equipment Co. v. Croix, 241 F. 2d 216 (5th Cir. 1957, cert. denied), 77 S. Ct. 1296, 354 U.S. 910, 1 L.Ed.2d 1428; Fluor Engineers & Construction, Inc. v. Southern Pacific

Transportation Co., 753 F. 2d 444, (5th Cir. 1985, reh. denied), 760 F. 2d 269; Slattery v. Uvalde Rock Asphalt Co., 140 S.W.2d 987 (Tex. App. - Beaumont 1940, err. ref.); Curtis v. Speck, 130 S.W.2d 348 (Tex. App. - Galveston 1939, err. ref.) Beavers v. Darling, 491 S.W.2d 711 (Tex. App. - Waco, 1973, no writ); Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965); Ellis v. Great Southwestern Corporation, 646 F. 2d 1099 (5th Cir. 1981); Enserch Corp. v. Parker, 794 S.W.2d 3 (Tex. 1990); Gant v. DeLeon, 786 S.W.2d 259 (Tex. 1990); Martinez v. Becerra, 797 S.W.2d 283 (Tex. App. - Corpus Christi, 1990, no writ); Moreno v. Sterling Drugs, Inc., 787 S.W.2d 348 (Tex. 1990); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826 (Tex. 1990); Palmer v. Enserch Corp., 728 S.W.2d 431, 433 (Tex. App. - Austin,

1987, writ ref. n.r.e.); Parker v. Enserch Corp., 776 S.W.2d 638 (Tex. App. - Dallas 1989); Perry v. Kroger Stores, 741 S.W.2d 533 (Ct. App. - Dallas, 1987, no writ); Price v. Estate of Anderson, 522 S.W.2d 690, 691 (Tex. 1975); Rooke v. Jenson, 838 S.W.2d 229 (Tex. 1992); Sanchez v. Providence Memorial Hospital, 679 S.W.2d 732 (Tex. App.-El Paso, 1984, no writ); United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979); Valdez v. Charles Orsinger Buick Co., 715 S.W.2d 126 (Tex. App. - Texarkana, 1986, no writ).

In all of these cases, the courts reach various conclusions, but in each case the court utilizes a factual analysis to make its determination. They do so because, clearly, the issue of due diligence to secure service of citation is a fact issue. Likewise, from these cases,

it is apparent that Texas courts do engage in a "no harm, no foul" analysis.

The court of appeals also attaches importance to the fact that Everett sent his letter to the Gas Companies indicating he had filed suit on November 12, 1990, but actually did not file suit until November 19, 1990. As is shown by the record, Everett sent these notices from his attorney's office in Sweetwater, Texas, but the suit was filed in Odessa, Texas, some 120 miles away. The delay is easily attributable to the time necessitated by mailing.

Regardless, it is clear that the gas companies received a true and correct copy of Everett's Original Petition at or near the time that suit was filed. This fact was never disputed.

It is possible the court of appeals erred because it misapprehended the true

facts of the case. At page 9 of its opinion, the court stated that "Everett did not institute efforts to make service until more than a year after the statute of limitations had run, . . ." As has been shown, this statement also is factually inaccurate. The statute of limitations expired in September, 1991. Service was perfected about six months (not "more than a year") later. It is possible that the court's misapprehension of the facts contributed to its erroneous conclusions.

As set out above, the issue of due diligence was fairly raised and properly determined by the trial court and jury. These decisions should not have been overturned.

SUMMARY OF ARGUMENT

The opinion of the court of appeals is in error. Had this case been decided

before a state appellate court, the question of whether diligence was used in procuring service of citation would never have been reached. More likely, it would have been held that the purposes of the statute were met and there was no harm to the defendant. Even had the court reached the issue of due diligence, it would have surely held that an issue of fact was raised by the evidence (given the circumstances of this case) and that the issue was answered by the jury.

The judgment of the district court should have been affirmed.

The decision of the court of appeals overrides the purposes of the Texas statute of limitations. The result is injustice.

CONCLUSION

Petitioner respectfully requests that this court grant his Petition for Writ of Certiorari and direct the Fifth Circuit Court of Appeals to affirm the trial court.

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OF COUNSEL:

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8648
(Summary Calendar)

GENE EVERETT d/b/a
5 Star Diesel Repair, ET AL., Plaintiffs-Appellees,

versus

AMERICAN CENTRAL GAS COMPANIES, IN
C., ET AL, Defendants-Appellants

Appeal from the United States
District Court for the
Western District of Texas
(MO-92-CA-064)

(June 9, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless

In this negligence suit, Defendants-Appellants American Central Gas Companies, Inc. and Tristar (collectively "Gas Companies") appeal the adverse judgment, contending that the Texas statute of limitations barred the claim. The district court denied the Gas Companies' motions for summary judgment, judgment as a matter of law, renewed judgment after trial, and new trial. After reviewing the application of Texas statute of limitations de novo, we conclude that a sixteen month delay in obtaining service of process without a legally sufficient explanation demonstrates nondiligence as a matter of law.

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expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

FACTS AND PROCEEDINGS

On September 19, 1989, Plaintiff-Appellee Gene Everett's business premises, 5 Star Diesel Repair, were destroyed by an explosion, which he blamed on the negligent operation and maintenance of Gas Companies' nearby gas gathering systems. Consequently, Everett (through his attorney) sent a demand letter to the Gas Companies on April 10, 1990. The Gas Companies responded that there was no factual basis for a negligence claim because the Texas Railroad Commission had issued a letter indicating that a leaking propane tank - and not the gas gathering operations - had caused the explosion. In August, Everett forwarded additional information about his claim to the Gas Companies, which did not respond.

On November 12, 1990, Everett again

contacted the Gas Companies, sending letters to American Central and Tristar containing the following statement:

> Please advise if you will accept service and file a response on behalf of your client . . . . If I do not hear from you within ten days, I will assume that your client will not allow you to do so and will proceed to have a citation served on it.

In the letter to Tristar, Everett also stated: "Since I have not heard from you after my last letter with its enclosures, I was compelled to file suit." This was not correct, however, as Everett did not actually file suit until one week later, on November 19. After filing his complaint, Everett did not attempt to serve process on the Gas Companies. Neither did he provide additional notice to the Gas Companies that the pleading had been filed.

On March 24, 1992, following sixteen months of inactivity, Everett requested

service of process. Service was finally effectuated on March 30. As explanation for this lengthy period of inaction, Everett's attorney said that he had failed to notice that the Gas Companies had not filed answers during that time. His self-described "mistake" was due to his attention to other business and family matters and his incorrect belief that the Gas Companies would accept service and no service of citation would be necessary.

The Gas Companies filed a joint answer on April 16, 1992, removing the case to federal court based on diversity. They then moved for summary judgment, alleging that Everett failed to use due diligence in attempting to procure service of process. The district court denied the motion, and the case proceeded to trial. The Gas Companies moved for judgments as a matter of law at the close of Everett's

case-in-chief and at the close of its case, both of which motions were denied. After the jury returned a verdict in favor of Everett, the Gas Companies renewed their motion for new trial, which was likewise rejected. The Gas Companies timely appealed.

II.

ANALYSIS

A. Standard of Review

Both sides present the standards of review for each decision of the district court - the denial of summary judgment, the denial of the renewed motion for summary judgment after trial, and the denial of the motion for new trial, suggesting that this court should review each decision accordingly. We note, however, that we do not review the denial

of a motion for summary judgment.[1] The denial of motions for judgment as a matter of law and judgment after trial are reviewed de novo. These motions should be granted "only if the nonmoving party has failed to present 'substantial evidence . . . of such quality and weight that reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusions.'"[2] A motion for new trial is reviewed for abuse of discretion.[3]

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[1] Wells v. Hico Independent Scho. Dist., 736 F.2d 243, 251 n.9 (5th Cir. 1984). The standard of review presented in both briefs is, in fact, the standard for review of a grant of summary judgment.

[2] Argubright v. Beech Aircraft Corp., 868 F.2d 764, 766 (5th Cir. 1989) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

[3] Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 269 (5th Cir. 1980).

More importantly, at issue in the instance case is the interpretation of Texas law governing statutes of limitation. In reviewing a district court's interpretation of state law, we accord no deference, but review the decision de novo.[4]

B. Due Diligence

Texas law - the law which governs this case - imposes a two year statute of limitations, accruing from the moment of injury, on suits for property damage.[5] The Texas Supreme Court has construed the applicable statute in Gant v. Deleon:[6]

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[4] Salve Regina College v. Russell, 111 S.Ct. 1217, 1221 (1991).

[5] TEX. CIV. PRAC. & REM. CODE ANN. §16.003(a).

[6] 786 S.W.2d 259 (Tex. 1990) (emphasis added).

> To "bring suit" within the two-year limitations period prescribed by section 16.003, a plaintiff must not only file suit within the applicable limitations period, but must also use due diligence to have the defendant served with process.[7]

In other words, for a suit to be deemed timely filed, there are two requirements: (1) the suit must be filed within that time period specified in the statute of limitation; and (2) diligent efforts to accomplish service of process must be instituted and prosecuted. Service of process accomplished as a result of diligent efforts relates back to the filing date even if that service is not effectuated until after the statutory limit has expired.[8] If, on the other hand, service occurs after the running of the statutory period without there having

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[7] Id. at 260.

[8] Id.

been duly diligent efforts to serve legal process, the claim is time barred.[9]

Although whether efforts to achieve service were diligent is normally a question of fact to be judged under a reasonably prudent person standard,[10] one line of cases does establish "that an unexplained delay of as little as six months demonstrates as a matter of law that the plaintiff lacked diligence in obtaining the issuance and service of process." A valid "explanation" is "an excuse offered that if proved would negate the inference of nondiligence."[11]

Here, the delay was sixteen months - well in excess of the minimum six months

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[9] Id. at 259.

[10] Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1113 (5th Cir. 1981).

[11] Id. at 1114.

held in other cases to demonstrate, as a matter of law, a lack of diligence. Everett's attorney insists, however, that he has explained the delay so that this line of cases is inapposite. To reiterate, his explanation was that (1) he was busy with other business and (2) he believed that the defendants would accept service even though they did not respond to his letters (in which, we note, he stated that if no response was forthcoming he would assume that they would not accept process.)

Although these are attempted explanations, they obviously do not rise to the level of "excuse[s] . . . that if proved would negate the inference of nondiligence."[12] Counsel's first assertion - that he was busy with other

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[12] Id.

cases and family business - is tantamount to an admission of nondiligence. A lawyer's inattention does not toll the statute of limitations.[13] Counsel's second assertion - that he believed the Gas Companies would accept service - simply cannot be squared with his own letter to the Gas Companies, which informed them that if they did not respond Everett would assume that they would not accept service. Counsel for Everett does not explain how, given the lack of response, he could have believed that the Gas Companies would accept service. In any event, a lawyer's failure to keep abreast of the proceedings in a lawsuit

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[13] Ferguson v. Estes & Alexander, 214 S.W. 465, 467 (Tex. Civ. App--El Paso 1919, no writ).

that he filed constitutes nondiligence.[14]

Everett argues due diligence is not an issue; rather, that the main issues are whether (1) the defendant has actual notice; (2) the defendant suffered any harm; and (3) the purposes of the statute of limitations have been met. Despite his failure to comply with a clear procedural requirement, Everett urges that his failure to follow the rule does not matter because the Gas Companies were not prejudiced by his mistake. In its simplest terms, Everett's argument is - "no harm, no foul." If taken to its absurdity - the statute of limitations would be eviscerated, only to be replaced with a case by case analysis of actual notice and harm. If this is the law

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[14] Sanchez v. Providence Memorial Hosp., 679 S.W.2d 732, 732-33 (Tex. App. -- El Paso 1984, no writ).

anywhere, it certainly is not the law of Texas.

Consequently, the district court erred in its interpretation of Texas law. Cases construing the Texas statute of limitations provision hold that in the absence of a legally acceptable reason a delay of six months or more in seeking service is nondiligent as a matter of law; and only due diligence to accomplish service can excuse service of process after the statute of limitations has run. Everett did not institute efforts to make service until more than a year after the statute of limitations had run, and even then provided no explanations for the delay which, if proved, would defeat the inference of nondiligence. His claim, therefore, is barred as a matter of law.

For the foregoing reasons, the district court's opinion is REVERSED and Everett's action against the Gas Companies is DISMISSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8648

GENE EVERETT d/b/a
5 Star Diesel Repair, ET AL., Plaintiffs-Appellees,

versus

AMERICAN CENTRAL GAS COMPANIES, INC., ET AL, Defendants-Appellants

Appeal from the United States
District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(July 2, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/s
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

GENE EVERETT, 5 STAR DIESEL REPAIR, INC. and MARYLAND CASUALTY COMPANY	§	
VS.	§	NO. MO-92-CA-064
AMERICAN CENTRAL GAS COMPANIES, INC. and TRISTAR ENERGY, INC.	§	

JUDGMENT

BEFORE THIS COURT, on the 28th day of September, 1992, the above-captioned cause was called for trial. Plaintiffs appeared in person and by attorney of record and announced ready for trial. Defendants appeared by representative and by attorneys of record and announced ready for trial. A jury of seven good and lawful jurors, including one alternative,

was duly impaneled and sworn. On the 29th day of September, 1992, the case proceeded to a trial on the merits. The Court prepared its Charge, the parties made their objections to the Charge, and the Court read its Charge to the Jury. The alternative juror was retained. The Jury on their oath, having heard the evidence, the argument of counsel, and the charge of the court, retired and deliberated and ultimately returned on unanimous verdict on the 1st day of October, 1992. The Jury was discharged.

The Jury, in response to the definitions, instructions, and questions submitted to them by the Court, made the following findings of fact:

QUESTION 1.

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANTS WERE NEGLIGENT IN PERFORMING OR FAILING TO PERFORM ANY ONE

OR MORE OF THE SPECIFIC ACTS OF NEGLIGENCE ALLEGED BY PLAINTIFFS?

ANSWER "YES" OR "NO."

ANSWER: YES

QUESTION 2.

DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANTS' NEGLIGENCE PROXIMATELY CAUSED THE EVENT IN QUESTION?

ANSWER "YES" OR "NO."

ANSWER: YES

QUESTION 3.

DO YOU FIND THAT THE NEGLIGENCE, IF ANY, OF PLAINTIFFS PROXIMATELY CAUSED THE EVENT IN QUESTION?

ANSWER "YES" OR "NO"

ANSWER: NO

QUESTION 4.

WHAT PERCENTAGE OF THE NEGLIGENCE THAT PROXIMATELY CAUSED THE EVENT IN QUESTION DO YOU FIND TO BE ATTRIBUTABLE TO EACH OF THE FOLLOWING PARTIES:

a. DEFENDANTS 100 %

b. PLAINTIFFS 0 %

TOTAL . . . . . 100 %

QUESTION 5.

WHAT IS THE DIFFERENCE IN THE MARKET VALUE, IF ANY, OF THE FORMER BUILDING AND PARTS INVENTORY OF PLAINTIFFS IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE EVENT IN QUESTION?

ANSWER IN DOLLARS AND CENTS OR "NONE."

ANSWER: $140,000.00

QUESTION 6.

WHAT IS THE DIFFERENCE IN THE ACTUAL VALUE, IF ANY, OF THE PERSONAL PROPERTY OF PLAINTIFFS IMMEDIATELY BEFORE AND IMMEDIATELY AFTER THE EVENT IN QUESTION?

ANSWER IN DOLLARS AND CENTS OR "NONE."

ANSWER: $50,000.00

QUESTION 7.

WHAT SUM OF MONEY, IF ANY, DID PLAINTIFFS REASONABLY EXPEND IN AN EFFORT TO MITIGATE OR LESSEN THEIR LOSSES?

ANSWER IN DOLLARS AND CENTS OR "NONE."

ANSWER: $66,000.00

QUESTION 8.

WHAT SUM OF MONEY, IF PAID NOW IN CASH, WOULD FAIRLY AND REASONABLY COMPENSATE PLAINTIFFS FOR THEIR LOSS OF MONEY,IF ANY,

WHICH WOULD REASONABLE BEEN PAID ON ACCOUNTS RECEIVABLE RESULTING FROM THE EVENT IN QUESTION?

ANSWER IN DOLLARS AND CENTS OR "NONE."

ANSWER: $15,000.00

QUESTION 9.

WHAT SUM OF MONEY, IF PAID NOW IN CASH, WOULD FAIRLY AND REASONABLY COMPENSATE PLAINTIFFS FOR THEIR LOST PROFITS, IF ANY, RESULTING FROM THE EVENT IN QUESTION?

ANSWER IN DOLLARS AND CENTS OR "NONE."

ANSWER: $45,000.00

QUESTION 10.

DO YOU FIND THAT PLAINTIFFS, THROUGH THEIR ATTORNEY, EXERCISED DUE DILIGENCE IN OBTAINING BOTH THE ISSUANCE AND SERVICE OF CITATION UPON DEFENDANTS?

ANSWER "YES" OR "NO."

ANSWER: YES

DATED: October 1, 1992

SIGNED: MARY PATRICIA DEVINE, FOREPERSON"

Pursuant to the Court's instructions, no other questions were answered by the

Jury. Accordingly, the following Judgment, pursuant to Rule 58 of the Federal Rules of Civil Procedure, is appropriate.

IT IS ORDERED Plaintiffs, GENE EVERETT, 5 STAR DIESEL REPAIR, INC. and MARYLAND CASUALTY COMPANY, are entitled to judgment against Defendants, AMERICAN CENTRAL GAS COMPANIES, INC. and TRISTAR ENERGY, INC., in the sum of $316,000.00, plus interest thereon at legal the Treasury Bill rate of 3.41% from the date of this Judgment until the Judgment is fully satisfied.

IT IS FURTHER ORDERED costs of court are assessed against Defendant, for which execution may issue. See 28 U.S.C. Section 1920.

IT IS FINALLY ORDERED all other relief not specifically granted by the

Judgment is hereby denied. The Clerk shall furnish a copy of the Judgment by regular mail to each attorney of record.

SIGNED this 7th day of October, 1992.

s/s
HONORABLE LUCIUS D. BUNTON, III, CHIEF DISTRICT JUDGE